IN THE

# Supreme Court of the United States

OCTOBER TERM 1940.

No. ~~813~~ 34

TEXTILE MILLS SECURITIES CORPORATION, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

EDMUND S. KOCHERSPERGER,
*Counsel for the Petitioner*,
811 Investment Building,
Washington, D. C.

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## CITATION OF CASES.

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The petitioner prays that a Writ of Certiorari issue to review the judgment or decree of a Circuit Court of Appeals for the Third Circuit entered in the above case on December 7, 1940, (R. 99) reversing a decision of the United States Board of Tax Appeals, and the denial of a motion for judgment by a different Circuit Court of Appeals for the Third Circuit on January 3, 1941, (R. 103) refusing to order a judgment affirming the said decision of the United States Board of Tax Appeals which had been rendered in favor of the petitioner.

## Opinions Below.

Three opinions (R. 66 to 99) by Judges within the Third Judicial Circuit are expected to be reported in 116 Fed. (2d) ..... The Board decision (R. 21-35) is reported in 38 B. T. A. 623. (Opinions below not yet reported)

## Jurisdiction.

A judgment of a circuit court of appeals for the Third Circuit was entered December 7, 1940. (R. 99) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Questions Presented.

1. Whether certain expenses incurred by the petitioner under contract committments in connection with the presentation of claims to Congress on behalf of former enemy aliens for the procurement and enactment of amendatory legislation authorizing the payment of the claims, are deductible by the petitioner in the ascertainment of taxable net income under the Revenue Act of 1928.

2. Whether a decision by the Board of Tax Appeals in favor of the petitioner has been both affirmed and reversed by a circuit court of appeals, so as to leave uncertain and in doubt the finality of decision by said Board within the meaning of pertinent statutes of the United States.

3. Whether the two judges of the Third Judicial Circuit who concurred in opinion for the affirmance of said Board decision in favor of the petitioner, were precluded from ordering a judgment of affirmance because bound by the opinions of the three other judges who opposed their views in that same judicial circuit, where all five of said judges purported to sit as a circuit court of appeals of five judges instead of a court of three judges as prescribed by the Judicial Code, Section 117; or, alternatively, whether the

views of said two judges constitute a judgment or decree of a circuit court of appeals in affirmance of said Board decision.

4. Whether the opinion concurred in by a quorum of two judges of the circuit court of appeals for the Third Circuit, agreeing for an affirmance of said Board decision, legally constitutes an affirmance of that decision so as to render said Board decision "final" within the meaning of Internal Revenue Code, Section 1140, if the respondent shall fail to file a petition for certiorari or, filing such petition, the same shall be denied by this Court.

5. Whether the decision of said Board, concurred in by two of the judges of the Third Judicial Circuit, should be affirmed as being founded upon correct statements of legal principles, or for reasons otherwise should be reversed.

6. Whether a "court en banc" when legally constituted within a judicial circuit, can omit from inclusion among the judges who sit as such court, the Associate Justice who has been assigned to that judicial circuit as Circuit Justice, the Chief Justice, or a District Judge.

7. Whether a circuit court of appeals can reach a conclusion adverse to a party-litigant in a case before the Board of Tax Appeals, by a disregard of the facts as agreed to by those parties and as found to be the facts by the Board.

8. Whether a majority of three judges out of five judges within the Third Judicial Circuit, are authorized to approve by their conclusions a shift by the respondent to a ground which the taxpayer had every reason to think was abandoned in the earlier stage of the litigation before the Board of Tax Appeals.

9. Whether the five judges who purported to render judgment of reversal of the Board decision by a three to two majority constituted a circuit court of appeals within the meaning of the Judicial Code and other pertinent statutes.

10. Whether the reenactment of the revenue-laws as to "ordinary and necessary expenses" deduction, constitutes a Congressional approval of the application of an Article in the Regulations dealing with "Donations by Corporations", as being pertinent to the Congressional intention in the language "ordinary and necessary expenses".

**Statutes and Regulations Involved.**

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 21 to 23.

**Statement.**

After the termination of the War of 1914-1918 by Presidential Proclamation in 1921, and after efforts by the German Foreign Office with our Department of State had failed to procure the settlement of claims by former enemy aliens for the seizure and detention of their properties under the Trading With The Enemy Act, the services of the petitioner were engaged by certain of the former enemy aliens for the procurement from Congress of an Act of Congress that would accord a settlement of their claims. (R. 21-27; 47-54)

Section 12 of the Trading With The Enemy Act (which authorized the seizures of enemy properties) stated:

> "after the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury shall be settled as Congress shall direct." (R. 33.)

The Treaty of Berlin, restoring friendly relations with Germany, incorporated into the Preamble portions of the Joint Resolution of Congress of July 2, 1921, prescribing in part:

> "All property of . . . German nationals . . . shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law

> until such time as the Imperial German Government . . . shall have . . . made suitable provision for the satisfaction of all claims against said Governments . . . of all persons . . . who owe permanent allegiance to the United States of America and who have suffered through the acts of the Imperial German Government. . . ."

The Settlement of War Claims Act of 1928 was enacted March 10, 1928 with title as follows:

> "AN ACT To provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary against the United States, and for the ultimate return of all property held by the Alien Property Custodian."

The petitioner performed the services required by its contracts in the procurement from Congress of that Settlement of War Claims Act of 1928, and was authorized by its charter for such an undertaking. (R. 49-55.)

The contracts between the petitioner and the former enemy aliens provided for compensating the petitioner upon a contingent fee basis, and also required that the petitioner bear and pay all of the expenses in performance of the services in procurement of the Act of Congress. (R. 52, 53)

In filing its tax-returns the petitioner included the commissions within gross-income and claimed deductions for the expenses which it had incurred in connection with procuring the Act of Congress. (R. 8, 20, 14-18.)

The alleged tax-deficiency results wholly from a disallowance of such expenses. (R. 14-18.)

When the case was presented to the Board, the respondent's sole contention was, that even though the expenses were "ordinary and necessary" nevertheless they were not deductible because they related to "sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda" within the meaning of Article 262 of Regulations 74, which had as its title

"Donations by Corporation". (R. 28) Article 121 of Regulations 74 covered the subject of "ordinary and necessary expenses", and made no mention or reference to the Article 262.

The case was submitted to the Board upon an Agreed Statement of Facts or Stipulation, (R. 47-59) wherefrom the Board was justified in its statement by opinion as follows:

> "Accordingly, we are unable to reach any conclusion except that the expenses here in question were in fact 'ordinary and necessary' in the conduct of petitioner's business and, having reached that conclusion, it is our opinion that the statute directs their allowance as deductions in determining petitioner's net income." (R. 34)

The Board also stated:

> "The respondent has made no claim, as we have pointed out, that such employment was outside the scope of petitioner's powers or business and we have concluded from the record that the services rendered were necessary for the accomplishment of the desired result. There has been no showing that the petitioner indulged in any questionable practices in carrying out the purposes of its employment and no showing or claim that the activities in respect of which the expenses were incurred were against public policy." (R. 33)

In Petition for Review to the Third Judicial Circuit the respondent, for the first time, raised the contention through Assignment of Errors that the expenses were not "ordinary and necessary". (R. 42.)

Effective March 1, 1940, the judges of the Third Judicial Circuit amended the Rules for that Circuit, Rule 4 providing:

> "CONSTITUTION OF THE COURT. QUORUM
>
> 1. The Court—Judges Who Constitute It—Number of Judges To Sit.

The court consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc.

2. Quorum—. . . .

Two judges shall constitute a quorum. . . ."

By a special order the argument of the case was directed to be held before the court "en banc". The argument occurred on July 1, 1940 before Judges Biggs, Maris, Clark, Jones, and Goodrich, (R. 66) but Mr. Justice Roberts did not attend the argument nor did he thereafter participate in opinions or decision or judgment, nor did the Chief Justice or a District Judge participate.

On December 7, 1940 three sets of opinions were enunciated. Judge Biggs rendered an opinion for reversal of the Board decision for certain stated reasons, with which Judge Jones concurred. (R. 66) Judge Maris rendered an opinion for affirmance of the Board decision for certain stated reasons, with which Judge Goodrich concurred. (R. 90) Judge Clark rendered an opinion for reversal of the Board decision for certain stated reasons, with which none of the other judges concurred. (R. 82)

All five of the judges, having approved the changes by Rule 4, agreed that the Circuit Court of Appeals for the Third Circuit was authorized to sit by five judges, instead of the three judges prescribed by Judicial Code, Section 117. (See opinions, R. 66 to 99)

After knowledge of the prejudicial action through a three-to-two holding by a court in excess of three judges prescribed by the Judicial Code, the petitioner filed a Motion for Judgment addressed to Judges Maris and Goodrich as constituting a "quorum of two judges" in a circuit court of appeals, (R. 100) as stated both in the Rule 4 and in

the Judicial Code. That Motion was denied January 3, 1941 by a circuit court of appeals comprising Judges Maris and Goodrich as a quorum of two judges. (R. 103) That Motion demanded, as a matter of right, the entering of a judgment by a circuit court of appeals for the Third Circuit, affirming the decision by the Board which held in favor of the petitioner. (R. 100)

In only one regard can the petitioner's counsel find a degree of harmony or agreement on the part of the reasons that actuated Judge Clark to a disagreement with the Board and an agreement with Judges Biggs and Jones,—namely, with reference to the point that the Respondent did not raise before the Board but raised for the first time by Assignment of Errors in the Petition for Review.

It was the opinion expressed by those three Judges Biggs, Clark, and Jones, that under no circumstances or facts could such expenses be deemed "ordinary and necessary", because they involved the procurement of an Act of Congress (R. 66 to 82).

The other reasons assigned in the opinion of Judge Biggs, renders a situation where two judges stood in agreement regarding those reasons for a reversal, while two other Judges, Maris and Goodrich, expressly and directly disagreed with those two of their colleagues, and with the separate reasons of Judge Clark as well. Judge Clark does not appear to have agreed with those other reasons expressed in the opinion of Judge Biggs.

The matter thus stands in a situation where two Circuit Judges, Maris and Goodrich, agreed with the majority of Board-Members, and the three other Circuit Judges agreed only with respect to an issue that had not been controverted or disputed before the Board, and such a situation of divergent views among five judges evidences the greater possibility for a lack of uniformity by a court "en banc" if engaged in by such circuits as the Sixth and Ninth where seven Circuit Judges are authorized to sit.

## Specification of Errors to be Urged.

1. A circuit court of appeals comprising Judges Maris and Goodrich as a quorum of two judges in a court of three judges specified by Judicial Code, Section 117, erred in refusing to order an entry of judgment of affirmance of the Board decision, as demanded by petitioner's Motion for Judgment.

2. The judgment of reversal of the Board decision is invalid because rendered as the action by a majority of five judges, instead of by a court of three judges as specifically provided by the Judicial Code, Section 117 and by the other pertinent provisions of that Code.

3. The alleged court en banc was illegally constituted, since it did not include within its membership the Associate Justice who was assigned as a Circuit Justice to the Third Judicial Circuit, nor the Chief Justice, nor a District Judge of the Circuit.

4. The circuit judges of the Third Judicial Circuit erred in holding and deciding that those judges, to the exclusion of the Circuit Justice holding assignment to that judicial circuit, the Chief Justice or a District Judge, can sit and decide a case as a "court en banc" in a situation (such as in the case at bar) where decisions within that circuit do not stand in a state of conflict and where the decision in the specific case would not stand in conflict with any prior decision within that circuit.

5. The Rule 4 of the Third Judicial Circuit, by authority of which the five judges purported to decide the case at bar by a majority of three judges to two judges, violates Article III, Section 1, of the Constitution of the United States, for the reason that a five-men court is not a part of "such inferior Courts as the Congress may from time to time ordain and establish", and to the contrary the Congress has prescribed a circuit court of appeals as a three-men court.

6. Any set up of five judges into a validly constituted circuit court of appeals of three members wherein any two of Judges Biggs, Clark, and Jones comprised a quorum of two judges, erred in holding and deciding that, collectively or alternatively:

(a) Petitioner's contracts were invalid or void as being against public policy.

(b) The facts as agreed upon between the parties and as found to be the facts by the Board, can be disregarded as the facts, and an adverse decision be rendered upon a different assumption of the facts, as made by such a quorum of judges.

(c) Petitioner's contracts or services sought the enactment of "favor legislation", as distinct from "debt legislation".

(d) The Trading With The Enemy Act did not in itself create "debt legislation".

(e) The Settlement of War Claims Act of 1928 was not in settlement of claims that Congress recognized to be existent by the expressed provisions of the Trading With The Enemy Act.

(f) The petitioner's expenses were not ordinary and necessary expenses within the construction of the Revenue Act of 1928.

(g) There is a conclusive and unrebuttable presumption of law that every contract requiring the performance of services for the procurement of "favor legislation" is improper, inferentially fraudulent or wrongful, and basically void as being against public policy, regardless of the contrary statement by the Board that no such issue was presented in the case before the Board.

(h) The opinion of Judge Maris, concurred in by Judge Goodrich, did not express the correct legal principles as the basis for a judgment affirming the Board decision.

(i) The circuit court of appeals can depart from the accepted and usual course of judicial proceedings, by reversing the Board on an issue that was not raised in the Board and wherein the advancing of the issue by the respondent for the first time within a circuit court of appeals represents a shift to a ground which the taxpayer had every reason to think was abandoned in the earlier stage of the litigation when before the Board.

(j) The cause should be remanded to the Board with the direction to redetermine the tax in accordance with the view expressed by the majority, and without according the petitioner any opportunity for the presentation of additional evidence material to the new issue first raised by the court itself in the opinions of Judges Biggs and Clark.

(k) That Congress, by the reenactment of the revenue laws without change in the language for deduction of "ordinary and necessary expenses", is to be presumed as having approved Article 262 of Regulations 74 (dealing with the subject "Donations by Corporations"), just as if that Article had been incorporated into Article 121 (which dealt specifically with "ordinary and necessary expenses"), although neither Article made the slightest specific reference to the other Article, and further, that Congress is to be presumed by such reenactment to have given its approval to an interpretation which the Bureau, for the first time, makes *in the very case at bar.*

(l) The ordering of a judgment of reversal of the decision of the Board of Tax Appeals.

7. If the court of five judges constitutes a validly composed circuit court of appeals for the Third Circuit, the court erred in holding and deciding relative to all of the grounds set forth herein under subdivision 6, (a) to (l) inclusive.

8. Although no statute or law enacted by Congress prohibited any of the actions engaged in by the petitioner in

performance of its contract obligations, the holding by Judges Biggs, Jones and Clark, converts without authority of law, the revenue-laws into a penal statute imposing a fine levied upon the petitioner's gross receipts because the petitioner engaged in a valid, legal, and unprohibited business undertaking which those judges personally did not favor, the holding in that regard constituting unconstitutional judicial legislation as an unauthorized assumption of the powers conferred by the Constitution upon the Congress.

**Reasons for Granting the Writ.**

1. The holding by the majority of three judges, that the expenses incurred in services under a void or illegal undertaking are not allowable deductions in the ascertainment of taxable net income, is directly in conflict with decisions of other courts, of the Board, and of the Treasury Department's own Rulings:

*Steinberg* v. *United States*, 14 Fed. (2d) 564 (2d C. C. A.)
*Alexandria Gravel Co. Inc.* v. *Commissioner*, 95 Fed. (2d) 615 (5th C. C. A.)
*Sullivan* v. *United States*, 15 Fed.(2d) 809, 810 (4th C. C. A.) (Reversed on other grounds, 274 U. S. 259)
*Helvering* v. *Hampton*, 79 Fed.(2d) 358 (9th C. C. A.)
*McKenna* v. *Commissioner*, 1 B. T. A. 326
*Frey* v. *Commissioner*, 7 B. T. A. 338
*Terrell* v. *Commissioner*, 7 B. T. A. 773, 776
*Bureau Ruling, IT 2175*, Cumulative Bulletin IV-1-141
*Bureau Ruling, S. M. 4078*, Cumulative Bulletin V-1-226 (cited with approval in *Kornhauser* v. *United States*, 276 U. S. 145, 153)

Additionally, that question is submitted as being "an important question of federal law which has not been, but should be settled by this court" (Rule 38, 5(b), Rules of this Court).

2. The holding by opinion of Judge Biggs, that the petitioner's contracts for the procurement of an Act of Congress and services connected therewith, were void as being against public policy, is in conflict with decisions by this Honorable Court and also with decisions in other courts.

*Winton* v. *Amos*, 255 U. S. 373, 393.
*Steele* v. *Drummond*, 275 U. S. 199; 11 Fed.(2d) 595 aff'd.
*Lucas* v. *Wofford*, 49 Fed.(2d) 1027 (5th C. C. A.)
(See, *Spalding* v. *Mason*, 161 U. S. 375)

3. The basing of their decision for the reversal of the Board decision by Judges Biggs, Jones, and Clark, upon the new issue involving "ordinary and necessary expenses", which had not been contested in the Board, represents a departure by the court "from the accepted and usual course of judicial proceedings", for which reason this Court granted certiorari in *Helvering* v. *National Grocery Company*, 304 U. S. 282, under Rule 38, 5(b), as involving a situation requiring the supervision by this Court, and the Rule is invoked for similar reasons here.

4. The single ground of unanimity by the majority of three judges out of five, is found solely by a "shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation" (quoting from *Helvering* v. *Wood*, 309 U. S. 344), which clearly appears upon a mere reading of the Stipulation of Facts (R. 47-59) and the Board's findings and opinion (R. 21-35) (Rule 38, 5(b), concluding clause, is suggested as being applicable).

5. The opinions by Judges Biggs and Clark, finding as their common ground for reversal of the Board decision (concurred in by Judge Jones as to reasons stated by Judge Biggs only), the conclusive and irrefutable presumption as to illegality both as to the contracts and the petitioner's actions, not only denying to the petitioner all right to prove the facts in the Board but also disregarding the facts to the contrary as agreed upon by the parties and found to be

the facts by the Board, would evidence a grave miscarriage of justice unless consideration be accorded by this Court, constituting a precedent against all taxpayers generally.

6. The holding by opinion of Judge Biggs, that the determination of deductibility as "ordinary and necessary expenses" is not a question of fact in relation to the business on which the taxpayer was engaged, is contrary to the decisions by this Court, as well as to the overwhelming weight of authority.

> *Welch* v. *Helvering*, 290 U. S. 111.
> *Kornhauser* v. *United States*, 276 U. S. 145.
> Also, cases cited under 1st subdivision above of "Reasons".

7. The holding by opinion of Judge Biggs, concurred in by Judge Jones as a "quorum", that whether expenses are "necessary" depends upon the establishment by proof of a proximate causation between the incurrence of the expense and the end sought to be accomplished by the expenditure, is so original as to revoluntionize all previous interpretations of the language "ordinary and necessary expenses", and emphasizes such extreme importance to every business in the United States, relative to the determination of income taxes, (the Treasury Department as well), as to merit consideration and decision by this Court by way of clarification on such an important subject.

8. The holding by opinion of Judge Biggs regarding the effect of Article 262 of Regulations 74 by reason of the reenactment of the revenue-laws as to deduction of "ordinary and necessary expenses", in a situation where said Article 262 related to the specific subject of "Donations by Corporations" and an entirely different Article dealt with the subject of deductible expenses (without any cross-reference), represents such a startling and original extension of the doctrine of "legislative aproval", as to merit the consideration by this Court in a clarification of such an important subject, as finds recent comment in various Law Reviews:

"Regulations, Reenactments, and the Revenue Act", 54 Harvard Law Review 377.

"A Summary of the Regulations Problem", 54 Harvard Law Review 398.

"Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale Law Journal 660.

"Treasury Regulations and the Wilshire Oil Case", 40 Columbia Law Review 252.

"The Scope and Effect of Treasury Regulations, etc." 88 University Of Pennsylvania Law Review 556.

Paul, "Studies in Federal Taxation", Third Series, 420.

8. The holding by opinion of Judge Biggs, concurred in by Judge Jones, converts the revenue-laws into a penal statute, without authority or precedent, and thus presents an original important question of law which never has been decided by this Court, but which merits this Court's consideration. See, opinion by Judge Maris in this case, and comment upon this case in Harvard Law Review, February 1941, Vol. 54, pages 698, 699.

9. The questions presented in this case have an importance, not merely to the petitioner, but to all taxpayers in general, because our Country now approaches high tax rates and actions similar to those prevailing during 1914-1918; within the past year the Defense Program stood inactive, until contracting-companies and Congress found agreement upon satisfactory legislation for charging off the amortization of defense facilities against income and, necessarily, expenses had to be incurred by the companies in the solicitation of such "favoring legislation" from Congress; many other situations of remedial legislation are certain to occur, from claims arising of defense-contracts and otherwise; with corporations at present facing maximum taxation of 24 per cent as a normal tax, 50 per cent as an excess-profits tax, and 12 per cent as a declared-

value excess profits tax, (with certainty of higher rates by legislation soon to be enacted), it is of particular importance that taxpayers know whether or not their expenses in soliciting Congress for remedial legislation are, or are not, to bear taxation, and the extent to which their actions shall be deemed proper under the First Amendment to the Constitution:

> "Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances."

In the case at bar, it should be noted, neither the petitioner nor its agents engaged in any conduct that was, to the slightest degree improper. The majority of judges impose "taxes" upon our gross receipts, without deduction for our expenses, solely because we entered upon contracts to obtain an Act of Congress in settlement of claims and honestly performed our contract obligations.

The Settlement of War Claims Act was not a mere matter of "legislation" in the ordinary sense of the term. It represented a compromise as between the representatives for the respective claimants, Germans against the United States and Americans against Germany. House Report No. 17, 70th Congress, 1st Session, at page 4, succinctly stated the situation:

> ". . . these parties and their representatives voluntarily got together and agreed upon the concessions to be made by each. The present bill proposes to carry out this agreement."

The "agreement", however, came only after a long contest throughout the Country, whereby the American-claimants sought the confiscation of the Germans' properties as represented in possession of the Alien Property Custodian, and the properties had to be preserved from such confiscation by the Germans' representatives meeting argument *with* argument. That was the sole and only reason for the petitioner's expenses in question. But the agreement

finally came and with it the Act of Congres. We direct attention to the Stipulation, Record p. 49 et seq:

> "6. The obligations of the petitioner under the aforesaid representation contracts were such as *necessitated* the conduct by the petitioner of an extensive educational campaign, the object of which was to acquaint and impress upon the American people and their representatives in Congress, the justice of the claims of the petitioner's principals. . . . The objective of the educational campaign so carried on by the petitioner *was accomplished* by the passage of the 'Settlement of War Claims Act of 1928'." (Italics added)

Despite that definite agrement of the parties, the opinion of Judge Biggs makes the statements that we neither proved the necessity nor showed the accomplishment as a "proximate cause".

The case could have been presented to the Board by detailed evidence that would have required as many years for trial, as the work in obtaining the Act of Congress. But such had no necessity, by reason of the Stipulation of Facts. The issue before the Board was a very narrow issue. The majority opinions disregard the agreement of parties, create an entirely new issue, find our contracts and actions illegal *ipso facto*, and declare that even where the very business of the taxpayer is the obtaining of an Act of Congress, the expenses cannot be deducted but the receipts must be "taxed".

To the ends of Justice, we submit, this Court should assume jurisdiction over such a situation.

10. The holding by the judges of the Third Circuit, that they may decide a case as a five-man circuit court of appeals, notwithstanding Judicial Code, Section 117, declaring:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum . . .",

is in conflict with the opposite views of the judges in the Ninth Circuit, *Lang's Estate* v. *Commissioner*, 97 Fed. (2d) 867, wherein that court certified questions to the Supreme Court (answered by this Court in 309 U. S. 264), because the judges of the Ninth Circuit deemed that they lacked authority to sit as a court by any greater number than the three judges prescribed by the Judicial Code, even though there stood in the Ninth Circuit a situation of conflicting decisions or views upon the same question of construction or application of the revenue-laws (which latter was not true in the case at bar).

Additionally, in at least three instances the Circuit Court of Appeals for the District of Columbia has denied the right to hearings by courts comprising all of the judges holding appointment to that circuit (with denial of Certiorari by this Court in two of the three instances); See, *United States, ex rel.* v. *Coe*, 302 U. S. 721, 776; 304 U. S. 589; *Davis* v. *Davis*, 305 U. S. 32; *Cox* v. *Thompson*, 305 U. S. 606.

The increases in the number of circuit judges in respective circuits repeatedly has occurred by Acts of Congress at the suggestion of the Attorney General, by reason of congested conditions in various circuits and resulting delays in trials, the available number of judges being insufficient to permit enough sittings of courts of three judges to handle the Calendars, and the addition of such new appointments permitting rotations of judges in sittings by three-judge courts. The intention of Congress for such a rotation, will be nullified by "courts en banc", wholly or partially, dependent upon the extent to which the practice may be carried. Furthermore, since by Judicial Code, Section 120, district judges may be assigned to comprise "the full court", if the term "full court" means a "court en banc" the work of the district courts may experience interference and congestion, if district judges are to be assigned to "courts en banc",—which, again, frustrates the intention of Congress in legislating for additional district judges.

The several opinions in the case at bar, illustrate the divergence of views by increase in number of judges beyond the prescribed three. Extension to the circuits where seven judges hold appointment, will increase the difficulty in ascertainment of a common ground for judicial decision.

The very length of this Petition has been necessitated by the difficulty in ascertaining just what was decided by "the court", and by *which* "court". Out of the five judges who heard this case, it is possible to find ten "circuit courts of appeals" in terms of three judges. The Rules of Third Circuit sanction a "court en banc".

The importance of the entire matter, for consideration by this Court, appears self-evident. Equally, that this Court should determine whether the Associate Justice assigned to a circuit, is an essential member of a "court en banc", if more than three judges is permissible,—or the Chief Justice or a District Judge of the Circuit.

11. The distinction made by the opinion of Judge Biggs, with which one other judge (Jones) agreed, but with wh two other judges (Maris and Goodrich) disagreed, thus pressing an equal division of views within the Third C cuit, between "favor legislation" and "debt legislatio , involves a basic and "an important question of federal law which has not been, but should be, settled by this court" (Rule 38, 5(b), Rules of this Court).

12. Rule 4 of the Third Circuit recognizes that two judges shall constitute a quorum, regardless of whether the "court" comprises three judges or sits "en banc". Accordingly, the views of Judge Maris as concurred in by Judge Goodrich, represents a quorum of a court "en banc" equally as well as a quorum of three judges. The Rules contain no provision for control by a majority, in a "court" exceeding the three judges prescribed by the Judicial Code. Accordingly, the opinions in the Third Circuit stand susceptible into expressions of conflicting views by *two* "courts en banc" within that same circuit, and further emphasizing

the importance of the matter as a reason for consideration by this Court.

Wherefore, it respectfully is submitted that this petition should be granted.

EDMUND S. KOCHERSPERGER,
*Counsel for the Petitioner,*
811 Investment Building,
Washington, D. C.

## APPENDIX.

### Statutes and Regulations Involved.

*Revenue Act of 1928, Section 23,* Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) EXPENSES.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable alowance for salaries or other compensation for personal services actually rendered; . . .

*Regulations 74.*

Article 121 (at page 34):

BUSINESS Expenses. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 141-271. . . . Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business. . . . A taxpayer is entitled to deduct the necessary expenses paid in carrying on his business from his gross income from whatever source. As to items not deductible, see section 24 and articles 281-284.

*Revenue Act of 1928, Section 23,* Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

. . . (n) CHARITABLE AND OTHER CONTRIBUTIONS.—In the case of an *individual*, contributions or gifts made within the taxable year to or for the use of. . . . (Italics added)

*Regulations 74.*

Article 261. *Contributions or gifts by individuals* (at page 85)

. . . . . .

Article 262. *Donations by corporations.* (at page 86)

Corporation are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23(n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependants are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

*Judicial Code, Section 117.* (U. S. Code Annotated, Sec. 212)

There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

*Judicial Code, Section 118.* (U. S. Code Annotated, Sec. 213)

. . . The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law. . . .

*Judicial Code, Section 120.* (U. S. Code Annotated, Sec. 216)

The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several

district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. . . . In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. . . .

*Internal Revenue Code, Section. 1142.*

*Petition for Review.* The decision of the Board . . . may be reviewed by a circuit court of appeals . . . as provided in section 1141.

*Internal Revenue Code, Section 1140.*

*Date When Board Decision Becomes Final.*

The decision of the Board shall become final—

(a) Petition for Review Not Filed On Time.— Upon the expiration of the time allowed for filing a petition for review, if no such petition has been fully filed within such time; or

(b) Decision Affirmed or Petition for Review Dismissed—

(1) Petition for certiorari not filed on time.—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) Petition for certiorari denied.—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or . . .

(e) Definitions.—As used in this section—

(1) Circuit Court of Appeals.—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia. . . .